Letter in the New Law Journal

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"Opposites attract"

I would respectfully suggest that Tracey Reeves' article on interpretation ("Opposites attract: plain English with a European interpretation", *NLJ* April 18, p 576) is a little confused and in some respects out of date.

She says "Any first year law student will be familiar with the golden rule, the mischief rule and the literal rule ..." Not if properly taught they won't.

It is over 20 years since Professor Sir Rupert Cross complained that every pupil he asked to write on the subject,., "told me there were the three " rules—the literal rule, the golden rule and the mischief rule"- He wrote a book to prove them wrong: see now Cross, *Statutory Interpretation* (Butterworths, 3rd edn, 1995), p vii:

In 1984, in the first edition of my own book with the same title, I said: "Alas, as this book demonstrates, there is no golden rule. Nor is there a mischief rule, or a literal rule, or any other cure-all rule of thumb. Instead there are a thousand and one interpretative criteria: see now Bennion, *Statutory Interpretation* (Butterworths, 2nd edn 1992), p2.

Tracey Reeves says of the judiciary that we should "allow them to abandon the literal rule in favour of a more teleological approach". We don't "allow" the judiciary to do anything, but in fact they have been applying such an approach for half a century of more. As long ago as 1975 Lord Diplock said that since the war there had been "a trend away from the purely literal towards , the purposive construction of' statutory provisions": *Carter v Bradbeer* [1975] 1WLR 1204 at 1206-1207. The trend has continued apace.

Tracey Reeves is right, however, to draw attention to the difficulties involved in the Unfair Terms in Consumer Contract Regulations 1994 (SI 1994/3159). Their requirement

that contracts should be written in "intelligible" language simply raises the question (unanswered) "intelligible to whom?" Saying that any ambiguity shall be resolved in the direction most favourable to the consumer simply raises the question (again unanswered) "what is meant by an ambiguity?"

In a letter I have not space to develop all that. However, on the last point I would just add that the fact that a provision does not yield a clear answer on its face need not mean it is ambiguous. It may for example have deliberately, even necessarily, left a vital question to be determined by the judgment or discretion (the two are not the same) of some person.

It is ironical that in the famous case of *Pepper (Inspector of Taxes), v Hart* [1993] AC 593, which abrogated the exclusionary rule prohibiting reference to Hansard in case of ambiguity or obscurity, there was not in fact an ambiguity or obscurity. All the judges said there was, but they were all mistaken. The case turned on a simple question of judgment, namely what was the "proper proportion" of certain expenditure to be taken into account for tax purposes.

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